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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1100~~ 66

EMIL H. STRASSBURGER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEO BRADY,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, on behalf of the above named Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on January 7, 1942, affirming the order of the United States Board of Tax Appeals which determined the presence of a deficiency in the 1936 income tax returns of petitioner.

Statement.

In the Circuit Court, two opinions were rendered, a majority opinion (per Swan, C. J., concurred in by Augustus N. Hand, C. J.—R. 32-35) and a dissenting opinion (per Chase, C. J.—R. 35). The judgment entered thereon (R. 36) affirmed the order of the Board of Tax Appeals (R. 17).

The facts (R. 12-14) were stipulated substantially as follows:

Petitioner resides in New York, New York.

E. H. Strassburger, Inc., sometimes hereinafter referred to as the Corporation, is a New York corporation organized in or about January, 1932, with its principal place of business at 740 Broadway, New York, New York.

On December 10, 1936, the authorized capital stock of the Corporation consisted of 200 shares of common stock with exclusive voting rights. All of this stock was owned by petitioner.

On December 11, 1936, the Corporation's articles of incorporation were duly amended for the creation and authorization of an issue of 500 shares of $100 par value, 7 per cent, cumulative, non-voting preferred stock.

On December 21, 1936, the board of directors of the Corporation held a meeting at which a resolution was adopted of which the following is material:

> "Now, Therefore, Be It Resolved, that for the purpose of representing in the capitalization of this corporation surplus assets to the extent of Five Thousand Dollars, a distribution among stockholders of the capital stock of the corporation be made of Five Thousand Dollars of preferred capital stock, and the proper officers of the corporation are hereby authorized and directed to issue an aggregate of Five Thousand Dollars, par value of preferred capital stock of this corporation, in payment of a stock dividend on the common stock of this corporation.
>
> "Further Resolved, that the directors of this corporation be authorized to distribute said Five Thousand Dollars of the preferred capital stock, pro rata, among stockholders, as and for a stock dividend on said capital stock so owned by them, such distribution to be made to stockholders of record at the close of business on December 24, 1936."

On December 24, 1936, pursuant to the resolution adopted on December 21, 1936, 50 shares of preferred stock of the Corporation were issued to petitioner, the sole common stockholder. At the time of the distribution of the stock dividend the Corporation had earnings and profits accumulated subsequent to February 28, 1913, in excess of $5,000. Appropriate book entries were made on account of the dividend, decreasing the surplus of the Corporation by $5,000 and increasing its capital stock in the same amount.

On December 29, 1936, the 50 shares of preferred stock which petitioner had received as a dividend were transferred to his wife, Gertrude W. Strassburger. Upon her death the shares were retransferred to petitioner who is now the record holder. No dividends have been paid on the preferred stock and that stock has never been disposed of, cancelled or retired.

(Agreed Statement of Facts, R. 25-28).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 7, 1942 (R. 36). The jurisdiction of THIS COURT is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. A. Title 28, Section 347 (a)).

The Question Presented.

Whether a stock dividend in preferred stock, declared by a corporation which had only a single class of stock outstanding—common—all owned by one person, may, on its receipt by him, be regarded as income within the meaning of the Sixteenth Amendment and be subjected to tax under Section 115 (f) of the Revenue Act of 1936, c. 690, 49 Stat. 1688.

Specification of Errors.

The errors presented for review, along with the question above, are set forth on pages 6-7 herein, and we request that said specification of errors be deemed incorporated in this Petition.

Reasons for Granting the Writ.

1. The question presented herein is an important question of federal law which, so far as our research has revealed, has not been directly settled, but should be so settled, by THIS COURT.

2. The majority opinion of the Circuit Court concludes with this pertinent observation: "It must be conceded, however, that the question [presented herein] is not free from doubt" (R. 34).

3. The decision of the Circuit Court is in direct conflict with the decisions of other Circuit Courts on the same matter. *Sprouse* v. *Commissioner of Internal Revenue*, 122 Fed. (2d) 973 (C. C. A. 9th, 1941), cert. den. March 2, 1942; *Clark* v. *Commissioner*, 77 Fed. (2d) 89 (C. C. A. 3rd, 1935), aff'g. 28 B. T. A. 1225; *Commissioner* v. *Brown*, 69 Fed. (2d) 602 (C. C. A. 7th, 1934), aff'g. 26 B. T. A. 901.

THIS COURT, as recently as March 2, 1942, denied the Commissioner's petition for certiorari in the *Sprouse* case (*supra*). The *Sprouse* case held that the real test to be used in determining whether the stockholder who received a dividend of stock in the same corporation has received taxable income, is whether the distribution effects a change in the proportionate interest of the stockholders.

In the instant case, the majority opinion (R. 34) has held that payment of a dividend in preferred stock to the sole stockholder of all the outstanding common stock has resulted in a rearrangement of the corporate capitalization and has changed the character of the sole stockholder's corporate ownership. The sole stockholder is adjudged to have received property rights of actual and exchangeable value and representing an interest different from that which his common shares represented, despite the cardinal fact that both before and after the stock

dividend the sole stockholder actually owned the entire interest in the net value of the corporation.

4. The majority opinion of the Circuit Court is in direct conflict with the principle underlying the decision of THIS COURT in *Eisner* v. *Macomber* (252 U. S. 189.) THIS COURT there held that a dividend payable in common stock to the holders of common stock, there being one class of stock then outstanding, was not constitutionally taxable as income because distribution of the dividends produced no change in the stockholders' proportionate interest in the corporation's net assets.

5. The dissenting opinion of Chase, C. J. (R. 35) should be considered by THIS COURT and sustained for guidance in future similar circumstances.

6. Definitively to settle the law applicable to this and other cases now pending in other courts and involving the same question.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued in the above-named cause under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, City of New York, New York, commanding said Court to certify and send to this Court on a day to be designated, a transcript of the record and all proceedings had in such a cause, to the end that such judgment referred to at page 1 hereof may be reviewed and determined by this Court; that said judgment may be set aside and reversed, and that petitioner be granted such other and further relief as may be just and proper.

Dated, New York, N. Y., March 20, 1942.

LEO BRADY,
Attorney for Petitioner,
165 Broadway,
New York, New York.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 14-17) is reported in 43 B. T. A. 1209 (memorandum).

The opinions of the Circuit Court of Appeals (majority opinion, R. 32-35, minority opinion, R. 35) are reported in 124 Fed. (2d) 315-317.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 7, 1942 (R. 36). The jurisdiction of THIS COURT is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. A. Title 28, Section 347 (a)).

Statement.

The material facts are set forth in the Petition at pages 1-3.

Statute Involved.

The statute involved is Section 115 (f) of the Revenue Act of 1936, c. 690, 49 Stat. 1688, and Art. 115-7 of Reg. 94 promulgated by the Commissioner of Internal Revenue.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred—

1. In holding that the receipt by petitioner of a dividend in preferred stock paid by E. H. Strassburger, Inc., which had only a single class of common stock outstanding, all of which was owned by petitioner, constituted taxable income.

2. In holding that the preferred stock dividend

   (a) gave petitioner rights different from those which he possessed before;

   (b) materially affected or changed the character of petitioner's corporate ownership;

(c) conferred upon petitioner property rights of actual and exchangeable value and representing an interest different from that which his common shares represented, and therefore gave rise to taxable income.

3. In holding that the petitioner received taxable income in the amount of the fair market value of the preferred stock dividend, resulting in a deficiency in income tax due by petitioner.

4. In failing to hold that there was no change in petitioner's proportionate interest in the corporation.

5. In failing to determine that the tax liability imposed upon petitioner is without warrant either under the United States Constitution, the Federal Statutes or the Regulations, with respect to the taxation of income thereunder.

6. In failing to determine that the Statutes and Regulations, insofar as the same may purport to tax the preferred stock dividend in question, are illegal, unconstitutional or void for want of certainty, clarity and definiteness and impose no tax basis or formunla for the computation of tax liability.

7. In affirming the decision of the Board of Tax Appeals.

Summary of Argument.

The receipt by petitioner of a dividend in preferred stock paid by E. H. Strassburger, Inc. which had only a single class of common stock outstanding, all of which was owned by petitioner, does not constitute taxable income within the meaning of the Sixteenth Amendment.

ARGUMENT.

POINT I.

The mere receipt of the stock dividend in question does not under the constitution, statutes or regulations constitute taxable income to the petitioner; any attempt so to impose such tax is unconstitutional and void.

Prior to 1936 all stock dividends were specifically made exempt from tax by statute; constitutionally, various stock dividends could not be taxed inasmuch as such stock dividends did not constitute taxable income.

Eisner v. *Macomber*, 252 U. S. 189.

It goes without saying that all income is not income subject to tax under the Sixteenth Amendment to the Constitution of the United States.

The statutory provision and the regulation upon which the Commissioner relies are as follows:

Revenue Act of 1936, c. 690, 49 Stat. 1688:

"Sec. 115 (f) Stock Dividends.

(1) General Rule: A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution."

"Art. 115-7 [Reg. 94] Stock Dividends.—A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall be treated as a dividend to the full extent that it constitutes income to the shareholders within the meaning of the Sixteenth Amendment to the Constitution. * * * The distinction between a stock dividend which does not, and one which does, constitute in-

come to the shareholder within the meaning of the Sixteenth Amendment to the Constitution is the distinction between a stock dividend which works no change in the corporate entity, the same interest in the same corporation being represented after the distribution by more shares of precisely the same character, and a stock dividend where there either has been a change of corporate identity or a change in the nature of the shares issued as dividends whereby the proportional interest of the shareholder after the distribution is essentially different from his former interest. A stock dividend constitutes income if it gives the shareholder an interest different from that which his former stock holdings represented. A stock dividend does not constitute income if the new shares confer no different rights or interests than did the old—the new certificate plus the old representing the same proportionate interest in the net assets of the corporation as did the old."

We believe that the Regulation squarely covers the instant case and makes the dividend non-taxable. In examining the Congressional purpose and intention we find the following discussion in connection with the Revenue Act of 1936, reported in the Congressional Record, Volume 80, Part 6, pp. 6214-15:

"Coming now to stock dividends, this is a field that has more or less been surrounded with mystery. Existing law provides that no tax shall be levied upon stock dividends. We strike that from this bill. * * *

"The kind of securities issued and the change in the proportion of ownership of a person in a corporation are the determining factors as to whether or not it is taxable income under the 16th amendment. * * *

* * *

"As we see it, a stock dividend that is not taxable is one in which the relative interest of each shareholder of a corporation is unchanged in his stock ownership. * * *

"There are, however, many instances in which dividends in stocks or bonds are issued which are realized taxable incomes under the 16th amendment. The yardstick of ownership in many cases is changed —that is, the relative proportion of ownership in the corporation by a shareholder is increased or decreased.

* * * p. 6309:

"The proposed plan does not change the law and does not in the slightest degree strike at the decision of the Supreme Court in the case of *Eisner* v. *Macomber* in respect of a stock dividend where there is no change in the proportion of ownership by the shareholder."

Editorial comment is to the same effect. In Commerce Clearing House, Standard Federal Tax Service, 1941, Vol. 2, at p. 3096, the Editors say:

"If there is only one class of stockholders at the time of the issuance of additional stock to all the stockholders, any dividend paid to all such stockholders in stock of the paying corporation, whether paid in common or preferred stock, would appear to be exempt under Section 115 (f), for the dividend results in no change in the proportionate interest of each stockholder in the earnings or in the assets of the corporation. * * *"

Nothwithstanding several reported decisions relied upon by Respondent which appear to justify the imposition of tax the Editors make the following significant observation: "Under the Act of 1936 and later Law such divi-

dend would be taxable if there was other stock outstanding at the time of the dividend which did not receive a pro rata distribution." In other words where the outstanding stock did not share proportionately in the stock dividend then the Editors contend that the dividend would be taxable; however, where all outstanding stock received a proportionate stock dividend, said dividend would not be taxable.

Perhaps the most thoroughgoing of all of the Board decisions on the subject is the case of *Horrmann, et al.*, 34 B. T. A. 1178. To the extent that the decision written by Board Member Arundell is pertinent to the instant case, we quote from page 1182 thereof:

> "* * * The dividend in *Eisner* v. *Macomber, supra*, was in common stock on stock of the same kind; here, it is in preferred stock on common stock, which was the only class outstanding. We held in *Pearl B. Brown, Executrix*, 26 B. T. A. 901; affd., 69 Fed. (2d) 602, that a dividend like the present one, namely, in preferred stock on common, where only common was outstanding, was a pure stock dividend 'constitutionally free from tax', following *Eisner* v. *Macomber, supra*. We said that its effect was 'a mere proliferation of existing interests'. Further:
>
> "'At the moment of change, each shareholder's proportionate rights were absolutely and relatively the same, except that each in the same ratio had preferred as well as common shares, a difference without significance here. These are the essential characteristics of a stock dividend—those which have always given point to the cases in which the question has arisen. *Gibbons* v. *Mahon*, 136 U. S. 549; *Towne* v. *Eisner*, 245 U. S. 418; *Eisner* v. *Macomber*, 252 U. S. 189; *La Belle Iron Works* v. *United States*, 256 U. S. 377; see also *Graves* v. *Graves*, 120 Atl. 420; *Kaufman* v. *Charlottesville Co.*, 23 S. E. 1003; *United States* v. *Siegel*, 52 Fed. (2d) 63.'"

After citing various other cases holding similarly because there was no severance of assets from the declarant corporations and because the stockholders' proportionate interest remained unchanged, the Board at pp. 1182-3 continued:

> "We do not believe that the recent case of *Koshland* v. *Helvering*, 297 U. S. 702,* requires a different conclusion. The facts there were different in that both common and preferred stock were outstanding when a dividend on the preferred was paid in common stock. There is, as pointed out in the *Koshland* decision, a distinction between cases like the *Macomber* case and those where 'the proportional interests of the stockholder after the distribution was essentially different from his former interest.
>
> "'* * * Where a stock dividend gives the stockholder an interest different from that which his former stock holdings represented, he receives income'. The quoted words state the theory upon which the Board and the Circuit Court of Appeals proceeded in *Tillotson Manufacturing Co.*, 27 B. T. A. 913; affd., 76 Fed. (2d) 189. In that case there were both common and preferred stock outstanding when the dividend on the preferred was paid in common stock. * * *"

It should be noted that Congress and the Courts have heretofore established as prerequisite to the taxability of a stock dividend that the interest be essentially different, substantially different.

We observe, running through the entire Congressional, editorial and judicial discussions, the controlling criterion or determining factor, namely, the stockholder's relative proportion of ownership in the corporation. Indeed in the Congressional discussions it has been called the yardstick, and the change in the law by the 1936 Act is stated

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* *Sic*—298 U. S. 441.

not to strike at the decision in *Eisner* v. *Macomber*, *supra*, "in respect of a stock ownership where there is no change in the proportion of ownership by the shareholder." In the *Horrmann* case, as here, the Board held that the dividend was a pure stock dividend "constitutionally free from tax".

The Board of Tax Appeals cited several cases, to wit: *John M. Keister*,* 42 B. T. A. 484; *Koshland* v. *Helvering*, 298 U. S. 441; *Frank J. and Hubert Kelly Tvast*, 38 B. T. A. 1014, remanded 106 Fed. (2d) 1002; *Albert E. Smith*, 39 B. T. A. 80. Those cases do not all involve the issue here presented but rather concern the basis for computing tax. Moreover we respectfully submit that the *Koshland* case, fairly interpreted, is no support for the imposition of tax herein. If indeed it should be held that the Board cases hereinabove noted are inconsistent with the principle which we urge, then we respectfully submit that those cases are wrong. There is no Circuit Court of Appeals decision supporting any of the said Board cases except the decision below; indeed the authority is to the contrary.

Sprouse v. *Commissioner*, 122 Fed. (2d) 973, (C. C. A. 9th) is the case supporting our contention and opposed to the holding of the Circuit Court in the case at bar. The Commissioner's application for certiorari was denied by this Court on March 2, 1942.

The court below, after reviewing the facts and the law, discusses the *Koshland* case, *supra*, (R. 34) and concludes that the dividend in question paid to the petitioner herein constituted taxable income. The Court then quotes the following, (R. 33) from the *Koshland* case:

> "'Under our decisions the payment of a dividend of new common shares, conferring no different rights or interests, than did the old,—the new certificates, plus the old, representing the same proportionate interest in the net assets of the corporation as did the

* Reversed under name of *Sprouse* v. *Commissioner*, *supra*.

old,—does not constitute the receipt of income by the stockholder. On the other hand, where a stock dividend gives the stockholder an interest different from that which his former stockholdings represented he receives income. The latter type of dividend is taxable as income under the Sixteenth Amendment.'"

In the *Koshland* case, however, both preferred and common stock were outstanding at the time that the common stock dividend was declared in favor of preferred stockholders. This fact, in the words of the Court below, is stated as follows (R. 34):

> "This expression of opinion would dispose of the case at bar were it not for the fact that in the *Gowran* case, as in *Koshland*, there were two classes of stock outstanding when the dividend was declared; hence the stock dividend in each of those cases changed the stockholder's proportionate interests in the net corporate assets. Here, however, there was only one class of stock outstanding and but a single stockholder, who after, as before, the dividend owned the entire beneficial interest in the net assets of the corporation."

Why this all important fact noted by the Circuit Court as the real difference between the *Koshland* case and the case at bar, was not definitive, it is difficult to understand. In the words of the Court, the following is the explanation (R. 34):

> "'Nevertheless, the rearrangement of corporate capitalization so that the petitioner held preferred as well as common stock did change the character of his corporate ownership. * * *'"

Frankly, we do not understand what the Court means by the character of the petitioner's ownership. Indeed, the true character of petitioner's ownership in the corporation was the entire ownership of the equity, and it is

immaterial whether that equity is reflected by shares of preferred stock or shares of common stock or both. The Court in the *Sprouse* case, *supra*, held that the true test was "whether the distribution effects a change in the proportionate interest of the stockholders." An entire interest can only be decreased, it may never be increased, and no abstruse metaphysics can change that simple fact of arithmetic.

The Court below further pointed out (R. 34) that the preferred stock had prior right to dividends and a preference on liquidation, and that these rights could be disposed of without affecting the voting control residing in the common stock (R. 34). Suffice it to answer that such difference is one of form and not of substance in view of the fact that all of the equity rested before and still rests with the petitioner.

Moreover, it is unimportant that prefered stock may be disposed of without affecting voting control, for the sole common stockholder may likewise dispose of a portion of his common stock without affecting voting control. But *Eisner* v. *Macomber*, *supra*, holds that a dividend of common on common is not taxable.

Further, if the theory of the tax were to prevent tax avoidance, which is not urged and which is not in issue, the law clearly covers such situation, for under Section 115 (g) of the Revenue Act of 1936 the cancellation, redemption or retirement of preferred stock is made taxable.

Viewed from every conceivable angle and analyzed with every conceivable theory in mind, there still appears no justifiable basis for the imposition of tax liability.

To justify the tax in the instant case the Court below seized upon the statement in the *Koshland* case which sustained the imposition of tax because the shares received by the recipient gave him a "different" interest. However, the word "different" means a difference in substance and not a difference in form and was so used

in the *Koshland* case. The whole principle of our Constitution preventing discrimination requires that the difference be one of substance. Were it not so, the classic school room examples of the red-headed man and the odd necktie would be sufficient to justify different discriminatory taxes and discriminatory treatment.

Rather do we urge as the sound and correct determination of the question presented the minority opinion of the Court below (R. 35), which requires as prerequisite to taxable income the increase in the stockholder's proportionate interest in the net value of the corporation. This simple criterion is, we submit, the true meaning of *Koshland* v. *Helvering*. Indeed, the language used fairly permits no other meaning.

Doubt existed as to the correctness of the decision even in the minds of the majority below for it concluded its opinion as follows (R. 34):

> "It must be conceded, however, that the question is not free from doubt. * * *"

If a "different interest" meant literally what the majority stated it meant, then even in *Eisner* v. *Macomber* stock dividend would be taxable, because the stockholder after the dividend held two pieces of paper where formerly he had only one piece of paper; he had something different, but of course, this difference was not of substance. An understanding of the nature and background of stock dividends makes clear what this Court meant in *Koshland* v. *Helvering* when it spoke of a different interest, if indeed, the language itself were not sufficiently clear, as we submit it was.

Further, the Treasury Department itself interpreted the question correctly, and in support of the petitioner. In Article 115-7 of Regulations 94, set forth on pages 8-9 herein, it appears that the word "different" as used in the *Koshland* case means different in substance, a change in the stockholder's proportionate interest. This obvious

point has already been noted herein, and need not be labored.

While the Treasury Department has since eliminated practically all of Article 115-7 from the current regulations, it remains unchanged in Regulations 94 applicable to the instant case, and the change shows a significant contemporaneous construction of the Statute by those charged with the enforcement thereof.

The facts of the *Sprouse* case, *supra*, are similar to the facts in the instant case. There the only stock outstanding was common, voting and non-voting. Stock dividends in non-voting common and in 7% cumulative preferred were declared payable to the voting and non-voting common stockholders. After discussing the facts and the meaning of the word "income" the Court (C. C. A. 9th), at page 976, made the following pertinent observations:

> "Generally, insofar as the stockholder is concerned, the three main differences in stocks are in the rights (1) to an interest in the assets of the corporation, the differences being in the amount of such interest and the preference it may have over other interests in the corporation; (2) to dividends, the differences being in the absoluteness of the right, and whether such right is cumulative; and (3) to manage and control the corporate venture by voting.
>
> "The Board was of the view, as appellee argues here, that if the stock distributed as a dividend, differed in its nature from that held by the stockholder, the latter derived income. In other words, differences in such characteristics as preference in interest in the assets and in dividends, and the right to vote, are proposed as the test to determine whether the recipient of the stock dividend has derived income. We think such a test results from a misconstruction of the decisions of the Supreme Court.
>
> • • •

"Where the corporation has more than one class of stock outstanding, and distributes a stock dividend to one class only, then the proportionate interests in the corporation are changed, because the class of stockholders who receive the dividend then have a greater interest in the assets of the corporation than those who did not receive the stock dividend. There being a change in the proportionate interests, the recipients of the stock dividend have derived income.

* * *

"Therefore, we believe the real test to be used in determining whether the stockholder who receives a dividend of stock in the same corporation has received income, is whether the distribution effects a change in the proportionate interest of the stockholders."

It should be noted that the sound body of law prior to the decision in the *Koshland* case held that the dividend in question was not taxable. We have already pointed out that even after the *Koshland* case, the Board decided in the *Horrmann* case that the dividend was still not taxable, which decision is now supported by the *Sprouse* decision, *supra*, certiorari denied.

Horrmann, et al., 34 B. T. A. 1178, discussed the facts and distinguished the *Koshland* case from the one there under consideration. The Board, at page 1182, says of the *Koshland* case:

"The facts there were different in that both common and preferred stock were outstanding when a dividend on the preferred was paid in common stock.

* * *"

Among various other cases supporting the *Horrmann* case are:

Commissioner v. *Brown*, 69 Fed. (2d) 602 (C. C. A. 7th, 1934), aff'g. 26 B. T. A. 901;

Clark v. *Commissioner*, 77 Fed. (2d) 89 (C. C. A. 3rd, 1935), aff'g. 28 B. T. A. 1225.

Moreover, in the instant case we are dealing with but a single stockholder who had no more and no less after the stock dividend than before. Irrespective of nice reasoning, the simple fact is that the petitioner neither in theory nor in law received taxable income upon the receipt of the stock dividend.

POINT II.

Apart from the Sixteenth Amendment, the statute and regulation, if they purport to impose income tax, are void as a matter of construction as well as constitutionality.

It is one of the elementary canons of taxation that a tax statute must be certain, clear and definite. Particulary is this true where penalties and imprisonment may be imposed for violation thereof. As heretofore pointed out the Statute does not, under the Sixteenth Amendment, impose an income tax on the stock dividend in question. However, if it should be so construed to impose a tax, then we respectfully submit that it is void as a matter of construction as well as constitutionality. What has Congress said to fix tax liability herein sought to be imposed? It has said that if the dividend is constiutionally taxable it may be taxed. The Sixteenth Amendment said as much, but certainly no one could soundly argue that taxes could be imposed and collected on the strength of a mere declaration that everything that is constitutionally taxable must be included in a taxpayer's return and that a failure would result in severe pains and penalties. A declaration of purpose or policy is not a tax law. A statute which requires a taxpayer at his risk to be a constitutional lawyer appears hopelessly invalid.

How shall the Courts construe the amendment if not in the light of what the framers of the Statute said?

They said, as we have shown before, that the stock dividend in question received by the petitioner herein is not taxable and was not intended to be taxed, even after the change in 1936. They said that they wanted to extend the tax to cover cases permitted by the decision of *Eisner* v. *Macomber, supra,* but that the instant case was not one of the cases which could constitutionally be affected.

We submit, further, that even if the Supreme Court of the United States should decide that the stock dividend received by the petitioner is constitutionally taxable, notwithstanding *Eisner* v. *Macomber,* that the dividend still would not be subject to tax because Congress under the 1936 Act accepted as the controlling constitutional criterion the Supreme Court decision in *Eisner* v. *Macomber* and not the decision of the Supreme Court in any other case. Therefore, as a matter of construction stock dividends constitutionally subject to tax are such dividends which the Supreme Court had in *Eisner* v. *Macomber* permitted to be taxable. Even assuming for the sake of the argument that Congress could sweep aside all standards and permit tax to be imposed on the basis of what is now constitutional, Congress has not yet done so and the Courts ought not to extend legislation beyond its clear Congressional limits.

In view of the foregoing, it is respectfully submitted that the receipt of the preferred stock dividend by the petitioner did not constitute taxable income.

Conclusion.

For the reasons herein assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

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